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No. ____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1987

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LAUREL C. THOMAS,
*Petitioner,*

v.

WALTER SHIPKA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTION PRESENTED

Whether courts applying *Wilson v. Garcia*, 471 U.S. 261 (1985), to select the single statute of limitations in each state for §1983 actions may choose the limitations period for specified intentional torts rather than the general limitations periods for personal injury actions?

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The petitioner, Laurel C. Thomas, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

## OPINIONS BELOW

The opinion of the United State Courts of Appeals for the Sixth Circuit, on rehearing, dated September 25, 1987, is reported at 829 F.2d 570 (6th Cir. 1987), and is reprinted at pp.

1a to 13a of the Appendix to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit, dated May 1, 1987, is reported at 818 F.2d 496 (6th Cir. 1987), and is reprinted at pp. 14a to 28a of the Appendix to this Petition.

The order of the United States District Court for the Northern District of Ohio, dated January 31, 1986, (on reconsideration) dismissing this action is unreported but is reprinted at pp. 29a to 32a of the Appendix to this Petition.

The order of the United States District Court for the Northern District of Ohio, dated July 16, 1985, denying defendant's motion to dismiss is unreported but is reprinted at pp. 33a to 35a of the Appendix to this Petition.

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on September 25, 1987, affirming the decision of the United States District Court for the Northern District of Ohio dismissing this action. On November 18, 1987, the United States Court of Appeals for the Sixth Circuit denied petitioner's timely petition for rehearing en banc.

The jurisdiction of this Court to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit is invoked under 28 U.S.C. §1254(1) (1982).

## STATUTES INVOLVED

This case involves 42 U.S.C. §1983(1982), which provides in relevant part:

> Every person who, under color of any statute,

> ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves 42 U.S.C. §1988 (1982), which provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

This case also involves the following provisions of Ohio law on statutes of limitations:

Ohio Rev. Code Ann. §2305.09 (Anderson 1981)

> An action for any of the following causes shall be brought within four years after the cause thereof accrued: . . . (D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

Ohio Rev. Code Ann. §2305.10 (Anderson 1981)

> An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose.

Ohio Rev. Code Ann. §2305.11 (Anderson 1981)

> (A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice . . . or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued . . . .

Ohio Rev. Code Ann. §2305.111 (Anderson Supp. 1986)

> An action for assault or battery shall be brought within one year after the cause of the action accrues.

## STATEMENT OF THE CASE

On April 7, 1983, petitioner Laurel C. Thomas, a Deputy Clerk in the Parma Municipal Court, was dismissed from the job she had held for the prior six and one-half years. The petitioner was fired by the Clerk of the Parma Municipal Court for reasons that she alleges were merely pretextual. The petitioner claims that the real reason the respondent, who is a Democrat, dismissed her from her nonpolicy making position was her

close working relationship with a Republican judge and the respondent's desire to replace her with a Democratic loyalist. (App. 15a)

On April 5, 1985, less than two years from the date of her dismissal, petitioner filed a civil action in the United States District Court for the Northern District of Ohio.[1] In her complaint she alleged a cause of action authorized by 42 U.S.C. §1983 and claimed that the defendant had violated her rights under the first and fourteenth amendments to the United States Constitution. For relief, the petitioner sought reinstatement and compensatory damages, including back pay. The suit was brought against respondent Walter Shipka in his official capacity as Clerk of the Parma Municipal Court.

On April 29, 1985, the respondent filed a motion to dismiss asserting *inter alia* a statute of limitations defense in which he claimed that §1983 actions in Ohio were subject to a one-year limitations period. (App. 15a)

On July 16, 1985, the district court, relying on this Court's April 17, 1985 decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), concluded that the appropriate limitations period in Ohio was the two-year limitations period in Ohio Rev. Code Ann. §2305.10 (Anderson 1981) for actions for bodily injury

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[1]Prior to filing this §1983 action, the petitioner applied for unemployment insurance benefits. In a decision mailed June 15, 1983, the Administrator of the Ohio Bureau of Employment Services decided that the petitioner was discharged for just cause in connection with work and disallowed her claim. On August 19, 1983, a Referee for the State of Ohio Unemployment Compensation Board of Review issued a decision affirming the Administrator's decision. On April 17, 1984, more than one year from the date of her discharge, the State of Ohio Unemployment Compensation Board of Review modified the Referee's decision and found that the petitioner was discharged without just cause in connection with work. Therefore, the petitioner was granted unemployment insurance benefits.

This information was contained in the decision of the State of Ohio Unemployment Compensation Board of Review, which was attached as an exhibit to plaintiff's complaint.

and denied the motion to dismiss. (App. 31a-32a)

On November 26, 1985, the United States Court of Appeals for the Sixth Circuit decided *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986), in which it held that the appropriate limitations period for §1983 actions in Ohio was the one-year period contained in Ohio Rev. Code Ann. §2305.11 (Anderson 1981) for actions for "libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice."[2] In taking this position, the Sixth Circuit rejected the two-year limitations period for actions for bodily injury in Ohio Rev. Code Ann. §2305.10 (Anderson 1981), and the four-year residual limitations period in Ohio Rev. Code Ann. §2305.09(D) (Anderson 1981) for other "injur(ies) to the right(s) of . . . plaintiff(s)." 777 F.2d at 343 n.4.

In light of the decision in *Mulligan*, the district court *sua sponte* reconsidered its previous ruling, and on January 31, 1986, held that plaintiff's §1983 claims were barred by the one-year statute of limitations. (App. 15a-16a; 33a-34a)

On May 1, 1987, the United States Court of Appeals for the Sixth Circuit affirmed the decision to dismiss this action. In so ruling, the Sixth Circuit refused to review *Mulligan*, pointing out that one panel of the court cannot overrule decisions of other

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[2]At the time the causes of action in both *Mulligan* and the present case arose, Ohio Rev. Code Ann. §2305.11 contained a limitations period for specified intentional torts, including actions for assault or battery. On September 26, 1984, the Ohio statutes were amended to create a new provision, Ohio Rev. Code Ann. §2305.111 (Anderson Supp. 1986), to govern the limitations period for assault or battery actions. Section 2305.111 continued to provide a one-year limitations period but tolled the running of the period in cases involving unknown assailants.

In addition to these two one-year limitations periods governing different specified intentional torts, Ohio has a longer limitations period for intentional torts not expressly referred to in the above statutes. *See Yeager v. Local 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666, 672 (1983) (applying four-year limitations period in Ohio Rev. Code Ann. §2305.09(D) (Anderson 1981) to the tort of intentional infliction of serious emotional distress).

panels,[3] and applied the one-year limitations period to §1983 actions. (App 17a) In addition, the Sixth Circuit followed *Mulligan* and applied the one-year limitations period retroactively.[4] (App. 17a-18a)

Petitioner then filed a timely Petition for Rehearing and Rehearing En Banc on the retroactivity issue. (App. 1a) The Sixth Circuit panel granted the motion for rehearing to review the retroactivity of the one-year limitations period in light of this Court's decisions in *St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987), and *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987), addressing the retroactivity of actions brought under 42 U.S.C. §1981 (1982), and this Court's grant of certiorari and summary order in *Vodila v. Clelland*, 107 S.Ct. 3255 (1987), *vacating for reconsideration* 802 F.2d 460 (6th Cir. 1986).

Reading *St. Francis College*, *Goodman* and the remand in *Vodila* as requiring retroactivity decisions to be made on a case by case basis under the standards of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Sixth Circuit concluded that prior to *Mulligan* there was no clear circuit precedent supporting a limitations period of more than one year upon which the plaintiff could have justifiably relied. (App. 8a-12a) Thus, the Sixth Circuit applied the one-year limitations period retroactively to the present case.[5]

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[3]The author of both the panel's decisions in this case, Judge Guy, has taken the position that the appropriate limitations period for §1983 actions in Ohio should be the two-year period in Ohio Rev. Code Ann. §2305.10, *see Demery v. City of Youngstown*, 818 F.2d 1257, 1261 n.3 (6th Cir. 1987) (Guy, J., concurring), but Judge Guy feels bound by *Mulligan*. *See id.* & App. 17a.

[4]The Sixth Circuit also rejected petitioner's argument that she had a direct claim under the constitution under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for which a longer limitations period was applicable. (App. 18a-28a) Petitioner has not presented a question as to the correctness of this ruling on her *Bivens* claim.

[5]Petitioner has not presented a question as to the correctness of the Sixth Circuit's holding on the retroactivity issue.

On November 18, 1987, the Sixth Circuit denied the petition for rehearing en banc and affirmed the judgment of the district court dismissing plaintiff's §1983 action based on the one-year Ohio statute of limitations.

## REASONS FOR GRANTING THE WRIT

### I. THERE IS A DIRECT AND IRRECONCILABLE SPLIT AMONG THE UNITED STATES COURTS OF APPEALS ON WHETHER STATE STATUTES OF LIMITATIONS FOR SPECIFIED INTENTIONAL TORTS SHOULD BE APPLIED TO §1983 ACTIONS.

The Sixth Circuit's adoption of the one-year limitations period in Ohio Rev. Code Ann. §2305.11 (Anderson 1981) for specified intentional torts[6] and its concomitant rejection of both the two-year limitations period in Ohio Rev. Code Ann. §2305.10 for actions "for bodily injury" and the four-year residual limitations period in Ohio Rev. Code Ann. §2305.09(D) "for an injury to the rights of the plaintiff not arising on contract nor enumerated in [other relevant sections] . . . of the Revised Code," raise an issue on which there is a direct and irreconcilable split among the United States Courts of Appeals.

Since the decision of this Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), the United States Courts of Appeals for the District of Columbia, First and Second Circuits have addressed

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[6]In dismissing this action based on the one-year statute of limitations, the Sixth Circuit did not undertake an independent analysis of *Wilson v. Garcia*, 471 U.S. 261 (1985), but rather followed *Mulligan*.

The plaintiff's claim in *Mulligan*, however, would have been time-barred under both the two-year and four-year limitations periods, and thus the Sixth Circuit's selection of the one-year limitations period was dictum. Nonetheless, subsequent Sixth Circuit panels, including the panel in this case, have felt bound to follow *Mulligan*'s selection of the one-year limitations period. *See also Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 2177 (1987).

the issue of the appropriate limitations period for §1983 actions in states that have more than one limitations period for personal injury litigation. These courts have rejected the use of limitations periods for specified intentional torts in favor of general limitations periods for personal injury actions.

In *Small v. Inhabitants of the City of Belfast*, 796 F.2d 544 (1st Cir. 1986), the First Circuit rejected the two-year limitations period in Me. Rev. Stat. Ann. tit. 14, §753 (1980), which applies to "[a]ctions for assault and battery, and for false imprisonment, slander, libel and malpractice of physicians . . . ." Characterizing that period as a narrow exception to the general limitations statute, the First Circuit adopted the six-year limitations period in Me. Rev. Stat. Ann. tit. 14, §752 (1980) for "[a]ll civil actions . . . except as otherwise specially provided."

In *Banks v. Chesapeake and Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986), the District of Columbia Circuit rejected the one-year limitations period for specified torts in D.C. Code §12-301(4) (1981), which applies to actions for "libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment". Instead, the District of Columbia Circuit adopted the three-year limitations period in D.C. Code §12-301(8) (1981), for all claims not otherwise provided for, which, the court noted, includes other intentional claims as well as non-intentional personal injury claims.[7]

In *Okure v. Owens*, 816 F.2d 45 (2d Cir. 1987), *pet. for cert. filed*, Dkt. No. 87-56, 56 U.S.L.W. 3017 (U.S. July 6, 1987), the United States Court of Appeals for the Second Circuit rejected the one-year limitations period in N.Y. Civ. Prac. L. & R. §215

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[7]*Banks* was a race discrimination claim under 42 U.S.C. §1981 (1982), but this Court subsequently held that the same limitations period applies in both §1981 and §1983 actions. *See Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (1987). In deciding *Banks*, the District of Columbia Circuit had to address the appropriate limitations period in §1983 actions to respond to the argument that the one-year period for enumerated intentional torts applied to both §1981 and §1983 actions.

(McKinney Supp. 1988) for actions "to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy . . . ." Instead, the Second Circuit adopted the three-year limitations period in N.Y. Civ. Prac. L. & R. §214 (McKinney Supp. 1988) for actions "to recover damages for a personal injury except as provided in sections 214-b, 214-c and 215 . . . ."

Thus, each of these courts has specifically rejected the state statutes of limitations for an enumerated group of intentional torts in favor of either a residual limitations period applicable to all other non-enumerated actions, including other personal injury actions, (*Small* and *Banks*) or a limitations period expressly applicable to "personal injury" actions (*Okure*).

Other Circuits, however, have taken the approach of the Sixth Circuit in *Mulligan* and in the present case.[8]

In *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986), the Eleventh Circuit adopted the Alabama six-year limitations period in Ala. Code §6-2-34(1) (1975) governing "[a]ctions for any trespass to person or liberty, such as false imprisonment or assault and battery" and rejected the one-year limitations period provided in Ala. Code §6-2-39(a)(5) (1975), which governed "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."[9]

In *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert.*

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[8]The Sixth Circuit itself has taken a position contrary to *Mulligan* in Michigan by rejecting the two-year limitations period for specified intentional torts in Mich. Comp. Laws §600.5805(2) (1979) in favor of the more general three-year statute for actions "to recover damages for the death of a person, or for injury to a person or property." Mich. Comp. Laws §600.5805(8) (1979). *See County of Wayne v. Carroll*, 107 S.Ct. 330 (1986) (White, J., dissenting), *denying cert. to Carroll v. Wilkerson*, 782 F.2d 44, 45 (6th Cir. 1986).

[9]Effective January 9, 1985, Alabama repealed Ala. Code §6-2-39 (1975)

*(Continued on following page)*

*denied*, 475 U.S. 1065 (1986), the Fifth Circuit adopted the Mississippi one-year limitations period in Miss. Code §15-1-35 (1972) for "actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels . . ." and rejected the six-year residual limitations period in Miss. Code §15-1-49 (1972) for "[a]ll actions for which no other period of limitations is prescribed."

In addition to these conflicts, which have arisen since this Court's decision in *Wilson*, the Tenth Circuit specifically rejected the use of limitations periods for intentional torts in Utah, Kansas, and Colorado in the three companion cases decided with *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984) (en banc), *aff'd*, 471 U.S. 261 (1985). In *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1052 (1985), the Tenth Circuit rejected the one-year limitations period in Utah Code Ann. §78-12-29(4) (1953) for "action(s) for libel, slander, assault, battery, false imprisonment or seduction" in favor of the four-year residual limitations period in Utah Code Ann. §78-12-25(2) (1953) for "[a]n action for relief not otherwise provided by law." Likewise, in *Hamilton v. City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1052 (1985), the Tenth Circuit rejected the use of the one-year limitations period in Kan. Stat. Ann. §60-514 (1983) governing "action(s) for assault, battery, malicious prosecution, or false imprisonment" in favor of the two-year limitations period in Kan. Stat. Ann. §60-513(a)(4) (1983) for "action(s) for injury to the rights of another, not arising on contract, and not herein enumerated."[10] Finally, in

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but extended the limitations period for the actions previously listed in Ala. Code §6-2-39(a)(5) (1975) to two years by adopting the language from §6-2-39(a)(5) in Ala. Code §6-2-38(l) (Cumm. Supp. 1987).

[10]Had this Court considered *Mismash* or *Hamilton* inconsistent with the principles developed in *Wilson*, the "normal course would have been to grant certiorari in order to vacate the decisions below and remand for reconsideration in light of *Wilson*." *Preuit & Mauldin v. Jones*, 474 U.S. 1105, 1108 (1986) (White, J., dissenting), *denying cert. to* 763 F.2d 1250 (11th Cir. 1985).

*(Continued on following page)*

*McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984) (en banc), the Tenth Circuit rejected the use of both the one-year limitations period in Colo. Rev. Stat. §13-80-102 (1973) for "actions for assault and battery, false imprisonment, slander, and libel" and the six-year limitations period for "[a]ll actions of assumpsit, or on the case founded on any contract or liability, express or implied," in Colo. Rev. Stat. §13-80-110 (1)(d) (1973), in favor of the three-year residual limitations period in Colo. Rev. Stat. §13-80-108(1)(b) (1973) for "[a]ll other actions of every kind for which no other period of limitation is provided by law."

Although there may be individual nuances and differences in the language among the statutes of limitations at issue in the various states from which the above decisions have come, what is at issue in these cases is "conflicting principles, not variations in state statutory schemes." *Preuit & Mauldin v. Jones*, 474 U.S. 1105, 1108 (1986) (White, J., dissenting), *denying cert. to* 763 F.2d 1250 (5th Cir. 1985). The federal courts of appeals are directly and irreconcilably split on whether courts entertaining §1983 actions should adopt the state statute of limitations for specified intentional torts or whether they should apply the more general state statute of limitations for personal injury actions.

## II. THE DECISION OF THE SIXTH CIRCUIT APPLYING THE OHIO LIMITATIONS PERIOD FOR SPECIFIED INTENTIONAL TORTS RAISES AN IMPORTANT ISSUE INVOLVING THE AVAILABILITY OF §1983 ACTIONS IN OHIO AND IN THE MAJORITY OF THE STATES.

This Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), removed much of the uncertainty concerning the

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Although the dispositions in *Mismash* and *Hamilton* are not decisions on the merits of the limitations issue, the unlikelihood of the Tenth Circuit changing its position given this Court's decision in *Wilson* to adopt the Tenth Circuit's approach to these issues further deepens the split among the circuits on the appropriate limitations period in §1983 actions.

selection of the appropriate statute of limitations in litigation under §1983 and the other surviving Reconstruction-era civil rights acts.

In *Wilson*, this Court held that the characterization of actions for purposes of selecting statutes of limitations for §1983 claims is a matter of federal law[11] and further held that there must be a single limitations period in each state. The *Wilson* Court also identified the criteria for selecting the appropriate limitations periods and required the adoption of the general limitations period for personal injury actions.

Subsequently, this Court addressed the identical statute of limitations issue in actions under 42 U.S.C. §1981 (1982), in *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987), in which it applied the *Wilson* principles to require the use of the same general limitations period for claims for personal injury. 107 S.Ct. at 2621. Finally, in *St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022, 2025-26 (1987), and *Goodman*, 107 S.Ct. at 2621-22, this Court held that newly adopted limitations periods that shortened the time to sue could be applied retroactively subject to a case by case review under the standards of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

None of these decisions, however, squarely addressed the question of the appropriate limitations period in states that have more than one limitations period that is arguably applicable to personal injury actions. This issue, which was identified by Justice O'Connor in her dissent in *Wilson v. Garcia*, 471 U.S. 261, 286-87 (1985), was not directly addressed in *Wilson* because New Mexico, the state in which *Wilson* arose, did not have a separate limitations period for intentional torts but used a single limitations period for all per-

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[11]Prior to *Wilson*, some states had adopted specific limitations periods for §1983 actions, *see, e.g., Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981) (Oregon); *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978) (Virginia), but *Wilson* makes clear that the characterization of §1983 for statute of limitations purposes is a matter of federal not state law. 471 U.S. at 269-70.

sonal injury actions.[12] Thus, after this Court rejected the use of the two-year limitations period from the New Mexico Tort Claims Act, N.M. Stat. Ann. §41-4-15(A) (1978), for actions against governmental entities in favor of the general limitations period for personal injury actions, the Court affirmed the Tenth Circuit's selection of the three-year New Mexico statute for personal injury actions without explicitly reaching the issue raised in this case.

The selection of the appropriate limitations period for personal injury actions in those states that have different limitations periods for enumerated intentional torts and other personal injury actions is an important issue that has arisen or will arise in more than half the states.[13]

The existence of different limitations periods for intentional torts and other personal injury actions is a legacy of the common law forms of action, which distinguished trespass and trespass on the case. At common law, the form of action for trespass involved an intentional act done with force and immediately injurious to the person of another or the property in his or her possession. *See* B. Shipman, *Common-Law Pleading* §35 (3d ed. 1923). Trespass on the case, on the other hand, was available when the wrongful act caused harm indirectly and without an intentional act of force. *See id.* at §§38-39. *See also Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1254 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986).

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[12]Under New Mexico law, the three-year limitations period in N.M. Stat. Ann. §37-1-8 (1978) for actions "for an injury to the person or reputation of any person" applied to intentional torts such as assault and battery as well as to non-intentional torts such as medical malpractice. *See Mantz v. Follingstad*, 84 N.M. 473, 505 P.2d 68, 72 (Ct. App. 1972).

[13]There are 27 jurisdictions, including the ten jurisdictions specifically identified in Part I, *supra*, that have different limitations periods for actions involving intentional torts and most other personal injury actions. *See* Shapiro, *Choosing the Appropriate State Statute of Limitations for Section 1983 Claims After Wilson v. Garcia: A Theory Applied to Maryland Law*, 16 U. Balt. L. Rev. 242, 245 n.18 (1987).

The most common pattern among states that have multiple limitations periods for personal injury actions involves a distinction between specified intentional torts and other personal injury actions. Some states have a limitations period for specified intentional torts and a different limitations period for actions involving personal injuries (*e.g.*, New York) or injuries to the person or rights of another (*e.g.*, Alabama, Kansas and Michigan). Other states have a limitations period for enumerated intentional torts but use a residual limitations period for other actions, including other personal injury actions (*e.g.*, District of Columbia, Maine, Mississippi and Utah).[14] In virtually all these states, however, the limitations period for the specified intentional torts is shorter than the limitations period applicable to other personal injury actions.[15]

As pointed out in Part I, *supra*, the federal courts of appeals are directly and irreconcilably split as to which limitations period to apply in states that have one limitations period applicable to specified intentional torts and another limitations period applicable to other personal injury actions. This issue, as petitioner has demonstrated, is an important one that affects litigants in

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[14]Ohio also distinguishes for statute of limitations purposes actions involving physical or bodily injury, *see* Ohio Rev. Code Ann. §2305.10 (Anderson 1981), from other non-enumerated actions involving the rights of plaintiffs. *See* Ohio Rev. Code Ann. §2305.09(D) (Anderson 1981).

This case, however, does not involve whether the proper statute of limitations for §1983 claims is one that covers all personal rights or one that is limited to cases involving physical or bodily injuries. That choice need not be made because under either the two-year limitations period for actions involving "bodily injury" or the four-year period residual period for other actions involving the injury of rights of plaintiffs (i.e., personal rights) petitioner's action would have been timely. The only issue necessarily raised in this case involves the Sixth Circuit's adoption of the one-year limitations period in Ohio Rev. Code Ann. §2305.11 (Anderson 1981) for certain enumerated intentional torts.

[15]Of the 27 jurisdictions that have different limitations periods for intentional torts and other personal injury actions, only one state, Alabama, has a longer limitations period for intentional torts. *See Shapiro, supra* note 13, at 245 n.18.

more than half the states and should be resolved by this Court.

## III. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN *WILSON V. GARCIA*, 471 U.S. 261 (1985), REQUIRING THE USE OF THE GENERAL LIMITATIONS PERIOD FOR PERSONAL INJURY ACTIONS.

In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court held that federal law governed the selection of the proper statute of limitations for §1983 actions and required the use of a single limitations period in each state. In addition, the *Wilson* Court characterized §1983 claims as general personal injury actions sounding in tort and concluded that the 42d Congress "would have characterized §1983 as conferring a general remedy for injuries to personal rights." *Id.* at 278. Thus, the Court required the selection of the state limitations period for personal injury actions in §1983 litigation.[16]

In selecting the single limitations period most appropriate for application in §1983 litigation, the *Wilson* Court looked to "the nature of the §1983 remedy, and ... [to] the federal interest in ensuring that the borrowed period of limitations not discriminate against the federal civil rights remedy." *Id.* at 276. *See also id.* at 279.

Section 1983 is only a remedy and confers no substantive rights. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979). The underlying federal rights actionable through §1983 are derived from a wide range of both statutory and constitutional provisions. The *Wilson* Court

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[16]The *Wilson* Court referred to both "general personal injury actions," 471 U.S. at 279, and "injuries to personal rights," *id.* at 278, but appears to have used those phrases interchangeably to refer to the large volume of general negligence-based tort litigation as contrasted to any sub-category of litigation involving intentional torts. *See id.* at 279 & n.42. This issue need not be resolved in this case because this action would be timely under either formulation. *See also supra* note 14.

recognized this in identifying "the wide diversity of claims that the new remedy would ultimately embrace."

> A catalog of other constitutional claims that have been alleged under §1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard - to identify only a few.

*Wilson*, 471 U.S. at 273.

The question then was this: with such a wide variety of potential claims under §1983, what statute of limitations should be used to avoid a multiplicity of limitations periods and yet to also avoid identifying §1983 with any one specific cause of action?

To answer this question, the *Wilson* Court reviewed the language of §1983, *see id.* at 277 (§1983 protects rights of "persons"), and its legislative history.

Looking at the legislative history of §1983, the Court recognized the circumstances out of which the Civil Rights Act of 1871 arose:

> The atrocities that concerned Congress in 1871 plainly sounded in tort. Relying on this premise we have found tort analogies compelling in establishing the elements of a cause of action under §1983, and in identifying the immunities available to defendants. As we have noted, however, the §1983 remedy encompasses a broad range of potential tort analogies, from in-

> juries to property to infringements of individual liberty.

*Wilson*, 471 U.S. at 277 [citations omitted].

The action before the Court in *Wilson* could have been analogized to "false arrest, assault and battery, or personal injuries." *Id.* at 273. The Court chose the latter, opting for the general over the specific, despite the close resemblance between the specific lawless conduct that the Civil Rights Act of 1871 was designed to curb and many of the traditional common law intentional torts.

Unconstitutional conduct that also constituted intentional torts was clearly one of the concerns of the 42d Congress, and a major purpose of §1983 was to create a new federal remedy to supplement inadequate state remedies. *See Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). The *Wilson* Court recognized this and rejected the broad range of tort analogies, from injuries to property to infringements of individual liberty, as well as the analogy to state remedies for wrongs committed by public officials, although that is quintessentially what §1983 is all about. As this Court noted in *Wilson*: "It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Act in the first place. Congress therefore intended that the remedy provided in §1983 be independently enforceable whether or not it duplicates a parallel state remedy." 471 U.S. at 279.

The selection by this Court of the general limitations period for personal injury actions hardly seems unintentional. As the Second Circuit noted in *Okure v. Owens*, 816 F.2d 45, 48 (2d Cir. 1987), *pet. for cert. filed*, Dkt. No. 87-56, 56 U.S.L.W. 3017 (U.S. July 6, 1987):

> We believe that the *Wilson* Court's choice of the term "general" to describe personal injury torts analogous to section 1983 claims was neither casual nor superfluous. Rather, we read

> therein a command that our choice of statute of limitations . . . be expansive enough to accommodate the diverse personal injury torts that section 1983 has come to embrace so as not to exclude claims that stray from a precisely drawn analogy.

The *Wilson* Court also looked to the federal interest in ensuring that the borrowed limitations period did not discriminate against §1983 actions.[17] In identifying the neutral limitations period that it had selected, this Court noted that:

> General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when §1983 was enacted. It is most unlikely that the period of limitations applicable to such claims ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect.

471 U.S. at 279.

In selecting the one-year Ohio limitations period for an enumerated group of intentional torts, the Sixth Circuit strayed from the principles developed in *Wilson*.

The decision of the Sixth Circuit in *Mulligan* (which governed the present case) relied extensively on those portions of *Wilson* that reviewed the legislative history of §1983 and

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[17]Statutes of limitations for intentional torts are invariably shorter than limitations periods for other personal injury actions because of the disfavored status of the former. Thus, even if intentional conduct is more *analogous* to the lawless conduct that the 42d Congress sought to eliminate, the use of short limitations periods for intentional torts would still not be *appropriate* in light of the purpose of §1983 of supplementing ineffective state remedies. *See Shapiro, supra* note 13, at 258-61.

reflected the concern of the 42d Congress about the lawlessness in many of the southern states. This reliance by the Sixth Circuit, however, confuses the holding in *Wilson* with its rationale. *Wilson* relied on the concerns of the 42d Congress with official lawlessness to support the conclusion that the limitations period for personal injury claims was a better analogy than the limitations period for claims for property damage or breach of contract. 471 U.S. at 277. In no place did the *Wilson* Court suggest that its discussion of the outrages that led to the passage of the Civil Rights Act of 1871 required the adoption in each state of a single statute of limitations that was most analogous to the conduct that concerned the 42d Congress. Rather, this Court looked to the circumstances surrounding the passage of the Civil Rights Act of 1871 to reach the more general conclusion that §1983 should be characterized as conferring a "general remedy for injuries to personal rights." *Wilson*, 471 U.S. at 278. *Had* this Court felt that the appropriate analogy was to intentional torts, it surely would have so indicated and then selected the New Mexico limitations period that encompassed intentional torts.

By requiring courts entertaining §1983 actions to select a general limitations period for personal injury actions rather than a limitations period for intentional torts, *Wilson* sought a limitations period that would be unlikely, whether intentionally or inadvertently, to discriminate against §1983 actions.[18]

The Sixth Circuit's adoption of the one-year limitations period for intentional torts for §1983 actions in Ohio also conflicts with this Court's decision in *Goodman v. Lukens Steel*

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[18]The use of a one-year limitations period for intentional torts may not provide plaintiffs the reasonable time to sue in light of the practicalities of §1983 litigation. *See Burnett v. Grattan*, 468 U.S. 42, 50 & 53 n.15 (1984) (rejecting six-month limitations period). The Second Circuit recognized this when it questioned whether the one-year New York limitations period gave proper weight to the federal interests at stake. *See Okure v. Owens*, 816 F.2d 45, 48 (2d Cir.), *pet. for cert. filed*, Dkt. No. 87-56, 55 U.S.L.W. 3017 (U.S. July 6, 1987) (rejecting one-year limitations period in favor of a period that was "long enough to effectuate the policies embedded in section 1983").

*(Continued on following page)*

*Co.*, 107 S.Ct. 2617 (1987), applying *Wilson* to §1981 actions. In *Goodman*, this Court reaffirmed its holding in *Wilson* classifying §1983 actions as "claims for personal injury" and required the use of the same personal injury limitations period in a §1981 case involving "a fundamental injury to the individual rights of a person." 107 S.Ct. at 2621.

In selecting the limitations period for personal injury actions as the appropriate limitations period for §1981 claims, this Court was dealing with contractual and other claims that have little in common with the intentional torts enumerated in the one-year Ohio limitations period. In *Goodman*, this Court made clear that the search for an appropriate limitations period in both §1981 and §1983 actions was a search for a general limitations period that was consistent with the purposes of §1983 and with the range of claims that could be raised in such actions. *Id.*

Most state court personal injury litigation does not involve intentional torts. Moreover, although negligent conduct may not be the basis of a due process claim under the fourteenth amendment, *see Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986), §1983 itself does

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Given the absence of a federal tolling policy in §1983 litigation, *see Johnson Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the plaintiff in the present case would have had to file her §1983 action before she obtained a final administrative decision in the appeal of her unemployment insurance claim. *See supra* note 1. Such a course of action, however, would have risked administrative res judicata applying to the earlier unfavorable administrative findings. *See University of Tennessee v. Elliott*, 106 S.Ct. 3220 (1986).

In addition, the increasingly heavy demands placed on counsel, especially plaintiff's counsel in civil rights litigation, *see* Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 631 (1987), by Fed. R. Civ. P. 11 make a one-year limitations period unreasonable in light of the complexity of §1983 litigation, *cf. Kirchoff v. Flynn*, 786 F.2d 320, 323-24 (7th Cir. 1986) (§1983 litigation more complex than traditional tort litigation), and adversely affects the "administration of justice [which] is not well served by the filing of premature, hastily drawn complaints." *Burnett*, 468 U.S. at 50 n.13.

not contain an intent requirement, *see Parratt v. Taylor*, 451 U.S. 527, 534 (1981), and is available to reach both negligent and other non-intentional violations of federal law.

In addition, many violations of the underlying provisions of federal law actionable through §1983 do not require the proof of intentional conduct on the part of the defendants. This Court has left open "whether something less than intentional conduct" is actionable in procedural or substantive due process claims, *see Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986), but lower federal courts have not limited due process claims to intentional conduct. *See* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* §3.5 (Supp. 1987). Moreover, many constitutional violations actionable through §1983 involve less than intentional conduct. For example, eighth amendment claims involving the medical needs of state prisoners require more than ordinary negligence but less than intentional conduct. *See Estelle v. Gamble*, 429 U.S. 97 (1976). Likewise, in adopting the test of objective reasonableness to govern the amount of force used to effectuate a seizure, *see Tennessee v. Garner*, 471 U.S. 1 (1985), this Court has not limited fourth amendment violations to those involving intentional conduct. Finally, violations of federal statutes, which may be actionable under §1983, *see Wright v. City of Roanoke Red. & Housing Auth.*, 107 S.Ct. 766 (1987); *Maine v. Thiboutot*, 448 U.S. 1 (1980), neither require intentional conduct nor resemble traditional intentional torts.

Thus, given the purpose of this Court in *Wilson* and the broad range of federal claims actionable through §1983, the Sixth Circuit's use of a limitations period borrowed from a state statute involving specified intentional torts should be rejected.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

February 1988

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# APPENDIX

*RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

No. 86-3230

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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LAUREL C. THOMAS,
*Plaintiff-Appellant,*

v.

WALTER SHIPKA, in his capacity as Clerk of the Parma Municipal Court,
*Defendant-Appellee.*

ON APPEAL from the United States District Court for the Northern District of Ohio.

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Decided and Filed September 25, 1987

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Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

GUY, Circuit Judge. On petition for rehearing.

Subsequent to the issuance of our original decision in this case (reported at 818 F.2d 496 (6th Cir. 1987)), plaintiff filed a timely petition for rehearing. The plaintiff's request for rehearing only concerned Part II of our opinion, in which we affirmed the district court's dismissal of plaintiff's 42 U.S.C. § 1983 claim on the basis that it was time-barred. The district court reached this conclusion based upon this court's decision in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, _ U.S. _, 106 S. Ct. 2902 (1986). In *Mulligan*

this court followed the dictates of *Wilson v. Garcia*, 471 U.S. 261 (1985), and chose a one-year statute of limitations to be applied to all § 1983 actions brought in the state of Ohio. The *Mulligan* panel further determined that its ruling was to be applied retroactively because it felt constrained to apply *Wilson* retroactively. Although plaintiff, in the original appeal, asked us to reconsider the retroactive application of *Mulligan*, we were unable to do so since a subsequent panel is bound by the decision of a prior panel on the same issue.

In the petition for rehearing, plaintiff contended that the *Mulligan* precedent was no longer valid in light of *St. Francis College v. Al-Khazraji*, 55 U.S.L.W. 4627 (U.S. May 18, 1987), wherein the Supreme Court held, *inter alia*, that the question of the retroactive application of a recently adopted statute of limitations should be analyzed in accordance with the principles set forth in *Chevron v. Huson*, 404 U.S. 97 (1971). Further, on June 19, 1987, the Supreme Court announced its decision in *Goodman v. Lukens Steel Co.*, 55 U.S.L.W. 4881, reaffirming the use of the *Chevron* analysis when deciding whether or not to apply a statute of limitations retroactively.[1] Both *St. Francis College* and *Goodman* involved claims brought under 42 U.S.C. § 1981, whereas the plaintiff's claims in the instant case were filed pursuant to 42 U.S.C. § 1983. Nevertheless, we find that the Supreme Court rulings are controlling in the case at bar.

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[1]Although the *Mulligan* court did not elaborate, it is clear that it felt compelled to apply *Wilson v. Garcia*, 471 U.S. 261 (1985), retroactively due to this court's earlier decision in *Smith v. General Motors Corp.*, 747 F.2d 372 (1984). In *Smith* we developed a rule for determining the retroactivity of Supreme Court decisions predicated upon whether the Supreme Court had applied its decision to the case before it. If it did, we concluded that the Supreme Court was demonstrating its intent that its decision should be applied retroactively. However, the Supreme Court's decision in *St. Francis College*, as well as its decision in *Goodman*, clearly make the rationale of *Smith* suspect. We conclude that *Smith* can no longer be the law in this circuit in light of the more recent Supreme Court pronouncements.

On June 26, 1987, the Supreme Court issued a summary order vacating the judgment of this court in *Vodila v. Clelland*, No. 85-3461 (6th Cir. August 1, 1986) and remanding the case for further consideration in light of *Goodman* and *St. Francis College*. *See* 55 U.S.L.W. 3870. Significantly, *Vodila* involved a claim brought under § 1983 and a panel of this court, relying on the same precedent we cited in Part II of *Shipka*, applied a per se rule of retroactivity thereby barring plaintiff's claims under the newly selected one-year statute of limitations. The Supreme Court's action taken with respect to *Vodila* compels the conclusion that the one-year statute of limitations adopted in *Mulligan* for all § 1983 claims brought in Ohio is *not* to be automatically applied retroactively and that the decision as to retroactivity must be made on a case-by-case basis.[2] Accordingly, we grant plaintiff's petition for rehearing in order to determine whether *Chevron* requires that the one-year statute of limitations adopted subsequent to plaintiff's filing suit be applied retroactively or prospectively.[3] After applying the *Chevron* analysis to the facts of this case, we conclude that the retroactive application of the one-year limitation period adopted in *Mulligan* is appropriate here.

## I.

In order to apply the *Chevron* analysis, we must first set forth a brief chronology of the major procedural events in this case and the relevant legal developments which occurred

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[2]Our conclusion that *Goodman* and *St. Francis College* are applicable to § 1983 cases is consistent with our recent decision in *Demery v. City of Youngstown*, 818 F.2d 1257 (6th Cir. 1987), wherein we held that the same one-year Ohio statute of limitations applied equally to §§ 1981 and 1983 controversies. *Id.* at 1261.

[3]We emphasize that the grant of rehearing is limited to the retroactivity issue discussed in Part II of our previous opinion. Our rulings in Parts I and III of that opinion remain unaffected by the conclusions reached in the discussion of the issue presented on rehearing.

during that period. Plaintiff was discharged from her job with the Parma Municipal Courts on April 7, 1983. Nearly two years later, on April 5, 1985, plaintiff filed suit in federal district court alleging that her termination was politically motivated and was effected without due process thereby giving rise to a cause of action under 42 U.S.C. § 1983 predicated on alleged violations of the first and fourteenth amendments to the United States Constitution. Less than two weeks after the plaintiff filed her suit, the Supreme Court issued its opinion in *Wilson v. Garcia*, instructing federal courts "to select, in each State, the *one* most appropriate statute of limitations." 471 U.S. at 275 (emphasis added). Prior to *Wilson*, the federal courts had been applying a variety of different state statutes of limitations to claims filed under 42 U.S.C. § 1983 depending on which state law cause of action was most closely analogous to the factual circumstances which gave rise to the federal claim.

Shortly after the Supreme Court's decision in *Wilson*, the defendant filed a motion to dismiss alleging a statute of limitations defense based on the one-year limitation period contained in Ohio Rev. Code Ann. § 2305.11 (Anderson 1981), which applied to actions for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice.[4] The district court denied the motion finding that *Wilson* called for the application of Ohio's two-year statute of limitations for general personal injury actions contained in Ohio Rev. Code Ann. § 2305.10 (Anderson 1981).[5] Approximately

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[4]We note that the Ohio Revised Code has recently been amended to create a separate statute governing claims for assault and battery. *See* Ohio Rev. Code Ann. § 2305.111 (Supp. 1986). The same one-year limitation period has been retained for both statutes; therefore, the amendment does not affect our analysis in the instant case. *See Mulligan*, 777 F.2d at 343 n.4.

[5]Ohio Rev. Code Ann. § 2305.10 (Anderson 1981) provided in part: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose." The current version of the statute, which appears at Ohio Rev. Code Ann. § 2305.10 (Supp. 1986), retains this identical language.

four months later, this court issued its decision in *Mulligan v. Hazard*, wherein we compared the two statutes of limitations and concluded that the one-year limitation period contained in section 2305.11 should be applied to all claims brought under 42 U.S.C. § 1983 in federal courts located within the state of Ohio. 777 F.2d at 344. The *Mulligan* court also held that this statute should be applied retroactively. *Id.* In response to *Mulligan*, the district court dismissed the plaintiff's claims *sua sponte* finding that they were untimely.

## II.

The general rule is that federal cases should be decided in accordance with the law existing at the time of the decision;[6] hence, there is a presumption in favor of applying the one-year limitation period selected in *Mulligan* retroactively to the plaintiff's claims. But in *Chevron*, the Supreme Court cautioned against the retroactive application of decisions adopting a new statute of limitations, setting forth a three-part test to be used when making such a determination:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question. Its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for

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[6]*See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981).

> avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-107 (citations omitted).

Of the three factors described above, the first one is the most important for purposes of our analysis in this case. Plaintiff contends that we should not give retroactive effect to our decision in *Mulligan* because that case represented a departure from clear precedent which had established a longer period of limitations for § 1983 claims filed in Ohio. The Supreme Court agreed with a similar argument in *St. Francis College* where it upheld the Third Circuit's refusal to apply a two-year limitations period retroactively because, at the time plaintiff had filed his complaint in 1978, a six-year period had been clearly established by Third Circuit precedent. *See Al-Khazraji v. St. Francis College*, 784 F.2d 505, 514 (3rd Cir. 1986), *aff'd*, _ U.S. _, 55 U.S.L.W. 4626 (U.S. May 18, 1987). In contrast, the Supreme Court upheld the retroactive application of the two-year limitation period in *Goodman* which also involved a § 1981 claim filed by a plaintiff in federal district court in Pennsylvania. The distinguishing fact was that the plaintiffs in *Goodman* had filed their claims in 1973, *before* the six-year limitations period had been clearly established as being applicable to § 1981 claims for employment discrimination filed in Pennsylvania. Therefore, the *Goodman* court could apply the two-year limitations period to bar some of the plaintiffs' claims since they were not entitled to rely on the six-year statute of limitations which was not firmly established until 1977. *See Goodman*, 55 U.S.L.W. at 4882.[7]

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[7]The Supreme Court's analysis of this issue in *Goodman* is highly instructive to our inquiry in the instant case:

> It is true, as the petitioners in No. 85-1626 point out, that the Court of Appeals decision in this case overruled prior Third Circuit cases, *Meyers v. Pennypack Home Ownership*

Not only did the first factor provide the decisive difference between the outcomes in *Goodman* and *St. Francis College*, it is also inextricably interrelated with the third factor in the *Chevron* analysis which focuses on the equitable considerations involved. If it were shown that the plaintiff had filed a claim within the then established limitations period, it would be inequitable to retroactively impose a shorter limitations period barring the plaintiff's claim. *See, e.g., Fitzgerald v. Larsen*, 769 F.2d 160 (3rd Cir. 1985). Conversely, it would not necessarily be inequitable to dismiss the action of a plaintiff who was not justified in relying on the longer limitations period which had not yet been clearly established. *See, e.g.,*

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*Assn.*, 559 F.2d 894 (1977); *Davis v. United States Steel Supply, Div. of United States Steel Corp.*, 581 F.2d 335, 338, 341, n.8 (1978), each of which had refused to apply the Pennsylvania 2-year personal injury statute of limitations to the § 1981 claims involved in those cases. But until *Meyers* was decided in 1977, there had been no authoritative specification of which statute of limitations applied to an employee's § 1981 claims, and hence no clear precedent on which petitioners could have relied when they filed their complaint in this case in 1973. In a later case, *Al-Khazraji v. St. Francis College*, 784 F.2d 505, 512-14 (CA3 1986), the Court of Appeals refused to apply retroactively the same 2-year statute in an employment discrimination § 1981 case because the case was filed when clear Circuit precedent specified a longer statute. Distinguishing its decision there from the case now before us, the Court of Appeals said: "In 1973, when the complaint was filed in the *Goodman* case, there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims." 784 F.2d, at 512. It was obviously for this reason that the Court of Appeals here said that its decision "should be given the customary retroactive effect." *Goodman, supra*, at 120. The Court cited its prior decision in *Smith v. Pittsburgh*, 764 F.2d 188 (1985), a post-*Wilson* case in which the Court of Appeals applied retroactively the 2-year statute in a § 1983 employment termination case because of the unsettled law in the Third and other circuits.

55 U.S.L.W. at 4882-83 (footnotes omitted).

*Goodman*, 55 U.S.L.W. at 4881. Thus, the importance of the third factor in the *Chevron* analysis is in large part dependent upon the outcome of the analysis under the first part of the test. To a certain extent, the equitable considerations will always militate against the retroactive application of a shorter limitations period if it would result in the dismissal of the plaintiff's claims. This consideration alone, however, is not necessarily determinative. *See, e.g., Goodman, id.*

With respect to the second factor, i.e., whether retroactive application would "further or retard" the operation of the new rule, it has been held that the goals of uniformity and simplicity, which provided the impetus for the Supreme Court's ruling in *Wilson*, were neither enhanced nor diminished by the retroactive application of a decision adopting a single statute of limitations in response to the *Wilson* mandate. *See Smith v. City of Pittsburg*, 764 F.2d 188, 196 (3rd. Cir.), *cert. denied*, 106 S. Ct. 349 (1985). Therefore, the second factor is neutral for purposes of our analysis. *See St. Francis College*, 784 F.2d at 513.

In sum, the crucial inquiry in this case focuses on whether at the time plaintiff filed her case there was a clear precedent upon which she could have justifiably relied establishing a definite limitations period for the type of claim brought by plaintiff under § 1983.

## III.

In the petition for rehearing, plaintiff contends that prior to our decision in *Mulligan* it was well-settled that claims filed pursuant to 42 U.S.C. § 1983 in federal district courts in Ohio were subject to the four-year limitations period contained in Ohio Rev. Code Ann. § 2305.09, which applies to certain torts including trespass, theft, fraud, and any other torts not otherwise provided for by other sections.[8] Plaintiff

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[8]Ohio Rev. Code Ann. § 2305.09 provides in part:

asserts that this precedent was firmly established as early as 1980 by the district court's decision in *Schorle v. The City of Greenhills*, 524 F. Supp. 821 (S.D. Ohio 1981). In *Schorle*, the plaintiff brought a § 1983 claim against various city officials and police officers alleging that he had been harassed and wrongfully arrested due to racial discrimination. The defendants filed a motion to dismiss arguing, *inter alia*, that plaintiff's claims were barred by the one-year limitation period contained in section 2305.11. In a published order, District Judge Spiegel set forth a lengthy review of cases decided within the Sixth Circuit where courts had selected various state statutes of limitations to apply to different types of § 1983 claims. Judge Spiegel observed that "[t]rial courts have been provided with little guidance in the methods to be used and in making the required analysis." 524 F. Supp. at 822 (quoting *Hines v. Bd. of Educ.*, 492 F. Supp. 469, 472 (E.D. Ky. 1980), *aff'd*, 667 F.2d 564 (6th Cir. 1982) (*per curiam*)). Judge Spiegel also noted that the Sixth Circuit had previously applied three different statutes of limitations to civil rights claims brought in Ohio.[9] The district court also

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An action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in §§ 2305.10-2305.12, inclusive, 2305.14 and 1304.29 of the Revised Code.

[9]*See Austin v. Brammer*, 555 F.2d 142 (6th Cir. 1977) (applying one-year statute of limitations for intentional torts (§ 2305.11)); *Mason v. Owens Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975) (six-year period for action upon a liability created by statute (§ 2305.07)); *Crawford v. Zeitler*, 326 F.2d 119, 121 (6th Cir. 1964) (four-year period for injuries to the rights of plaintiff not arising on contract or enumerated elsewhere (§ 2305.09)).

analyzed several other Sixth Circuit cases arising out of Michigan and Kentucky. After pointing to several inconsistencies in the decisions, the court concluded that the accepted method of analysis, i.e., selecting the most factually analogous state law claim, was unworkable because a § 1983 claim is necessarily "broader" than a simple common law tort.[10] Therefore, the *Schorle* court concluded that one single limitations period should be selected to govern all § 1983 claims arising in Ohio. Rejecting the one-year period in Ohio Rev. Ann. § 2305.11 as being contrary to the "broad remedial purposes" of the Civil Rights Act, the court instead opted for the four-year residual statute of limitations contained in section 2305.09.[11]

In support of the contention that *Schorle* established a "clear precedent," plaintiff cites to the subsequent district court decision in *Nash v. City of Oakwood*, 94 F.R.D. 83 (S.D. Ohio 1982). We note, however, that the *Nash* court adopted the six-year limitation period contained in section 2305.07 as opposed to the four-year period adopted in *Schorle*. *See* 94 F.R.D. at 87 n.2.[12]

Our review of the cases decided within the Sixth Circuit subsequent to the district court's opinion in *Schorle* demonstrates that *Schorle* was not the final word on the sub-

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[10]The court stated:

> From this analysis, it is not difficult to understand possible confusion among members of the bar, to say nothing of plaintiffs unschooled in the vagaries of the law, as to when an action for violation of one's civil rights may be brought.

524 F. Supp. at 825.

[11]In what appears to be dicta, the district court also seems to suggest that the Sixth Circuit should adopt the six-year limitation period contained in section 2305.07. *See* 524 F. Supp. at 827.

[12]Apparently, the *Nash* court interpreted *Schorle* as adopting the six-year period rather than the four-year statute of limitations. *See* 94 F.R.D. at 87 n.2.

ject. Less than a year after *Schorle* was issued, the Sixth Circuit expressly rejected the suggestion of District Judge Bertelsman that the court adopt a uniform statute of limitations in § 1983 cases. See *Hines v. Bd. of Educ.*, 667 F.2d 564-65 n.1 (6th Cir. 1982) (*per curiam*) (ex-teacher's § 1983 claims alleging wrongful discharge barred by Kentucky's one-year statute of limitations). Thus, the Sixth Circuit decision in *Hines* substantially undermined the rationale relied upon by Judge Spiegel in support of his opinion in *Schorle*. Moreover, in *Woods v. City of Dayton*, 574 F. Supp. 689 (S.D. Ohio 1983), *aff'd*, 734 F.2d 17 (6th Cir. 1984), the district court criticized Judge Spiegel's opinion in *Schorle* stating, "While Judge Spiegel's arguments are sound as a matter of policy and practicality, this court must conclude that they do not reflect, in their entirety, the controlling law in this circuit." 574 F. Supp. at 695. The *Woods* court also noted that "courts and commentators have observed that the Sixth Circuit has arguably been inconsistent and erratic in applying the most 'appropriate' state statute of limitations in civil rights cases." *Id.* at 694 (citations omitted). Rejecting Judge Spiegel's call for a single statute of limitations in all § 1983 cases, the *Woods* court adopted a bifurcated analysis of the plaintiff's § 1983 claims dividing them according to the supporting factual allegations and holding that those claims analogous to "assault" were barred under Ohio Rev. Code Ann. § 2305.11, whereas the claims akin to "trespass" were properly brought within the four-year period contained in section 2305.09.

The precedential effect of *Schorle* was further eroded by subsequent federal court decisions which continued to apply different statutes of limitations to § 1983 claims arising within Ohio. For example, in *Kilgore v. City of Mansfield*, 679 F.2d 632 (6th Cir. 1982), this court upheld the district court's refusal to apply either the four-year limitation period found in section 2305.09 or the six-year period in section 2305.07; and instead, held that the plaintiff's 42 U.S.C. § 1983 claims based on an allegedly wrongful arrest were barred by the one-year period in section 2305.11 which

applied to claims for a "false imprisonment." 679 F.2d at 634.

All three of these cases, *Hines, Woods* and *Kilgore,* were decided in the interim between the issuance of the supposedly definitive decision in *Schorle* and the point at which plaintiff's cause of action accrued. Under these circumstances, we find that the plaintiff was not justified in relying on the *Schorle* decision adopting Ohio's four-year statute of limitations for all § 1983 claims. This court has previously held that a ""clean break" does not automatically occur every time an appellate court renders a definitive ruling which clarifies the law by resolving an issue that had previously been a subject of confusion and conflict amongst the lower courts. *See Lawson v. Truck Drivers,* 698 F.2d 250, 254 (6th Cir.), *cert. denied,* 464 U.S. 814 (1983). The conflicting precedents discussed above demonstrate that this area of the law remained unsettled until we issued our opinion in *Mulligan.* Therefore, under the *Chevron* analysis, our decision in *Mulligan* adopting Ohio's one-year limitation period for all § 1983 claims can be applied retroactively to bar plaintiff's claims brought in this case.[13]

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[13]We emphasize that the outcome of a *Chevron* analysis is always dependent upon the facts present in each individual case. Our opinion in the instant case is not meant to suggest that *Mulligan* must always be applied retroactively to all § 1983 claims arising in Ohio. On the contrary, it is precisely this type of *per se* rule of retroactivity which we have rejected in our opinion on rehearing. Depending upon the particular facts alleged in support of a § 1983 claim, it is entirely possible that a factually analogous pre-*Wilson* case decided within the Sixth Circuit established a clear precedent upon which the plaintiff could have relied, thereby precluding the retroactive application of *Mulligan.* We merely hold that, given the facts and the type of constitutional violation alleged in this case, i.e., a politically motivated discharge from public employment, there was no well-established case law determining which Ohio statute of limitations would be most appropriate for that type of claim. Therefore, under these circumstances, *Chevron* does not require that *Mulligan* be restricted to prospective application.

Upon reconsideration, the motion for rehearing is GRANTED and the judgment of the district court is AFFIRMED.

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Finally, we note that our conclusion in the instant case is consistent with the recent decision of this court in *McSurely v. Hutchison*, No. 86-5046 (6th Cir. July 24, 1987). In *McSurely*, another panel of this court affirmed the decision of the district court which had used the *Chevron* test to conclude that a Kentucky one-year statute of limitations, adopted in response to *Wilson*, could be applied retroactively to bar the plaintiff's *Bivens* claim. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

*RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

No. 86-3230

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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LAUREL C. THOMAS,
*Plaintiff-Appellant,*

v.

WALTER SHIPKA, in his capacity as Clerk of the Parma Municipal Court,
*Defendant-Appellee.*

ON APPEAL from the United States District Court for the Northern District of Ohio.

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Decided and Filed May 1, 1987

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Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

GUY, Circuit Judge. Plaintiff, Laurel Thomas, appeals the district court's *sua sponte* dismissal of her civil rights action for failure to comply with the statute of limitations. For the following reasons, the judgment of the district court is affirmed.

On April 5, 1985, plaintiff filed this suit in the United States District Court for the Northern District of Ohio claiming that she had been wrongfully discharged by her employer in violation of her rights under 42 U.S.C. § 1983 and the first and fourteenth amendments to the United States Constitu-

tion. Prior to her dismissal, plaintiff had worked for six and one-half years as a deputy clerk in the Parma Municipal Court. On April 7, 1983, plaintiff was fired by the clerk of the court, defendant, Walter Shipka. Plaintiff alleged that the reasons given for her dismissal were merely pretextual and that the defendant, who is a Democrat, dismissed her because of her close working relationship with a Republican judge and because of the defendant's desire to replace her with a Democratic loyalist.

On April 29, 1985, defendant filed a motion to dismiss alleging, *inter alia*, a statute of limitations defense. The district court denied the motion finding that the recent decision by the United States Supreme Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), called for the application of Ohio's two year statute of limitations for general personal injury actions.[1] On January 17, 1986, defendant filed a motion for summary judgment. In response, plaintiff filed a motion for an enlargement of time to respond. In that motion plaintiff noted this court's recent decision in *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2902 (1986), wherein we held that § 1983 claims are governed by Ohio's one year statute of limitations.[2] In light of *Mulligan*, the district court reconsidered its previous ruling and held that both plaintiff's § 1983 claims and her direct constitutional claims were

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[1]Ohio Rev. Code § 2305.10 provides: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

[2]Ohio Rev. Code § 2305.11 provided in part: "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, ... shall be brought within one year after the cause thereof accrued ...."

We note that the Ohio Revised Code has been amended since our decision in *Mulligan* to create a special section for assault and battery retaining the one year limitations period. *See* Ohio Rev. Code § 2305.11. This amendment does not affect our previous analysis in *Mulligan* or in the instant case.

barred by the one year statute of limitations. Consequently, plaintiff's claims were dismissed *sua sponte*.

Plaintiff makes three arguments on appeal. First, plaintiff asks us to reverse our decision in *Mulligan* and apply Ohio's two year statute of limitations to § 1983 claims. In the alternative, plaintiff argues that we should not give retroactive effect to the *Mulligan* decision in the instant case. Finally, plaintiff contends that even if we find that her § 1983 claims are time-barred, we should still allow her to bring her claims directly under the Constitution pursuant to our jurisdictional authority contained in 28 U.S.C. § 1331. Plaintiff further contends that these direct constitutional claims are subject to Ohio's six year statute of limitations which applies to actions based on a statute.[3] We address each of these issues separately.

I.

In *Wilson* v. *Garcia*, the Supreme Court instructed the federal courts "to select, in each State, the *one* most appropriate statute of limitations for all § 1983 claims." 471 U.S. at 275 (emphasis added). In response to the Supreme Court's directive, this court examined the various Ohio statutes and held that the one year statute of limitations contained in Ohio Rev. Code § 2305.11 governs all § 1983 claims filed in Ohio. In *Mulligan*, we stated:

> As noted above, Ohio has two statutes of limitations which relate to personal injury actions, Ohio Rev. Code §§ 2305.10 and 2305.11. In our opinion, § 2305.11 is the more appropriate of the two statutes of limitations for actions arising under the civil

[3]Ohio Rev. Code § 2305.07 provides: "Except as provided in § 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

> rights statutes. As the Supreme Court noted in *Wilson*, Congress enacted the Civil Rights Act of 1871 in order to combat the violence that was being perpetrated by the Ku Klux Klan and other organizations against the newly emancipated slaves. The concern of Congress, thus, was with perpetuators of intentional tortious conduct. While both §§ 2305.10 and 2305.11 theoretically encompass intentional tort actions, § 2305.11, which applies to actions involving assaults, batteries, and the like, more specifically encompasses the sorts of actions which concerned Congress as it enacted civil rights statutes. Accordingly, we hold that the one year limitations period contained in § 2305.11 governs Mulligan's actions.

777 F.2d at 344 (footnote omitted).

Plaintiff urges us to adopt the two year Ohio statute of limitations which we expressly rejected in *Mulligan*. Plaintiff argues that the *Mulligan* court misinterpreted the Supreme Court's ruling in *Wilson*, and therefore, we should reverse our previous decision. It is well established that one panel of this court cannot overrule the decision of a previous panel. *See Salmi v. Secretary of Health and Human Services*, 774 F.2d 685, 689 (6th Cir. 1985). Consequently, we are bound by our previous decision in *Mulligan* which requires us to apply the Ohio one year statute of limitations to plaintiff's § 1983 claims.

## II.

Plaintiff contends that the *Mulligan* decision should not be given retroactive effect in the instant case. The *Mulligan* court, however, expressly held that the one year statute of limitations should be applied retroactively. 777 F.2d at 333-34. We reiterate that we are bound by the prior decisions of this court. Our decision in *Mulligan* is controlling in this case and requires us to affirm the district court's dismissal

of plaintiff's § 1983 claims for failure to comply with the applicable one-year statute of limitations. *See Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir. 1986) (*Mulligan* is *stare decisis* in this circuit and should be applied retroactively).

## III.

Despite the dismissal of her § 1983 claims, plaintiff argues that she should still be allowed to proceed with a cause of action based directly on the first and fourteenth amendments of the United States Constitution and relying on general federal question jurisdiction under 28 U.S.C. § 1331. Plaintiff asserts that these claims are separate and independent from her § 1983 claims and that they should be subject to Ohio's six year statute of limitations which applies to actions based on a statute.

In a footnote to our opinion in *Harris v. City of Canton*, 725 F.2d 371 (6th Cir. 1984), we stated that it was "unclear" whether this circuit should continue to recognize direct constitutional claims against local officials and municipalities in light of the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (holding that municipalities are "persons" within the meaning of § 1983). 725 F.2d at 374 n.3. Today we resolve this question by holding that in cases where a plaintiff states a constitutional claim under 42 U.S.C. § 1983, that statute is the exclusive remedy for the alleged constitutional violations.

Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

We begin our analysis with a recitation of this familiar statute in order to emphasize its broad scope which provides a cause of action for the "deprivation of *any* rights, privileges, or immunities secured by the Constitution . . . ." *Id.* (emphasis added). Although § 1983 encompasses every conceivable type of constitutional violation, it only provides a remedy against persons acting under color of state law, i.e., state and local officials and local units of government.

In the instant case, there is no question that plaintiff has stated a claim under § 1983 in that she has alleged that her rights under the first and fourteenth amendments were violated by a local official acting pursuant to his official authority. Notwithstanding the availability of a remedy under § 1983, plaintiff contends that she had an additional separate theory of recovery for her alleged constitutional violations based on 28 U.S.C. § 1331 which defines general "federal question" jurisdiction. Section 1331 provides in part: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

In support of her argument for the existence of an independent direct constitutional action, plaintiff cites to two lines of cases which have recognized such claims. First plaintiff points to the landmark decision of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), where the United States Supreme Court held that a plaintiff may bring a suit for money damages against a *federal agent* for violations of the plaintiff's fourth amendment rights with jurisdiction premised upon the federal question statute. *Id.* at 396. In *Bivens*, the Supreme Court found it necessary to create a direct cause of action under the Constitution because § 1983 does not provide a remedy for constitutional violations committed by federal officers acting under federal laws. In the instant case, plaintiff is suing a *local* official, who is a "person" within the meaning of § 1983. Therefore, *Bivens* is distinguishable both on its facts and its rationale.

We note that the Supreme Court has extended the *Bivens* rationale to allow direct claims arising under the eighth amendment and the fifth amendment. *See Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979). In *Davis*, the Court found that a female secretary who had been discharged from her employment by a United States Congressman could bring an action directly under the fifth amendment to obtain money damages from her employer for alleged sexual discrimination. 442 U.S. at 241-44. In *Green*, the Court held that federal prison officials could be held liable for money damages in an action brought directly under the eighth amendment for failure to provide proper medical attention to a prisoner. 446 U.S. at 20-24. Both *Davis* and *Green* involved constitutional claims brought against *federal* officials who were not amenable to suit under § 1983. Thus, like *Bivens*, these cases are distinguishable from the case *sub judice* where the plaintiff had the opportunity to avail herself of the remedy provided by § 1983.

The Supreme Court has never recognized a cause of action arising directly under the Constitution in a case where § 1983 was available as a remedy. Moreover, the Court's opinion in *Green* strongly suggests that it would not imply a direct constitutional cause of action in such a case. In *Green*, the defendants argued that the plaintiffs already had a remedy under the Federal Tort Claims Act (FTCA). Nevertheless, the Court held that a *Bivens*-type action should be implied unless the defendants could show (1) "special factors counseling hesitation in the absence of an affirmative action by Congress" or (2) "that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." 446 U.S. at 18-19 (emphasis in original) (citations omitted). The Court concluded that it should imply a direct cause of action because Congress had not expressly stated that the FTCA was an exclusive remedy and because "the *Bivens* remedy is more effective than the FTCA remedy." *Id.* at 20.

In contrast to the FTCA, § 1983 provides a substitute remedy which is equally effective to a direct cause of action under the Constitution. It is clear that the same standards apply to suits brought under § 1983 and *Bivens*-type claims since both provide remedies for violations of the same constitutional protections. *See, e.g., Butz v. Economou*, 438 U.S. 478, 499 (1977) (applying same standards of immunity to state officials under § 1983 and federal officials sued on similar grounds under direct constitutional actions). Thus, in light of the rationale followed by the Supreme Court in *Green*, we conclude that it is unnecessary and needlessly redundant to imply a cause of action arising directly under the Constitution where Congress has already provided a statutory remedy of equal effectiveness through which the plaintiff could have vindicated her constitutional rights. *See Graves v. Wayne County*, 577 F. Supp. 1008, 1013 (E.D. Mich. 1984) ("*Green* implicitly counsels that § 1983, not *Bivens*, is the appropriate vehicle for redressing constitutional claims against *state* officials") (quoting *Small v. Inhabitants of the City of Belfast*, 547 F. Supp. 761, 764 (D. Me. 1982) (emphasis in *Small*)).

In addition to the cases which have allowed *Bivens*-type claims against federal officers, plaintiff cites to several cases in which this court has recognized claims arising directly under the Constitution brought against local municipalities.[4]

In *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979), we stated:

> This circuit has held consistently that a direct cause of action under 28 U.S.C. § 1331 for violation of constitutional rights is available against a munici-

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[4]We note that in the instant case, the sole defendant is an individual local official and that the plaintiff has not alleged a claim against the municipality itself. Nevertheless, the cases involving constitutional claims against municipalities discuss many of the same principles at issue in the instant case and therefore are highly relevant to our analysis.

pality. *See Gordon v. City of Warren*, 579 F.2d 386, 389 (6th Cir. 1978); *Wiley v. Memphis Police Department*, 548 F.2d 1247, 1254 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); *Amen v. City of Dearborn*, 532 F.2d 554, 559 (6th Cir. 1976); *Hanna v. Drobnick*, 514 F.2d 393, 398 (6th Cir. 1975); *Bosely v. City of Euclid, supra*, 496 F.2d at 195; *Foster v. City of Detroit*, 405 F.2d 138, 144 (6th Cir. 1968); *Foster v. Herley*, 330 F.2d 87, 91 (6th Cir. 1964).

At least six other circuits have reached this conclusion, based upon the teachings of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971). *See Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978) (*en banc*); *Owen v. City of Independence*, 560 F.2d 925, 932-34 (8th Cir. 1977), *petition for cert. pending*; *McDonald v. Illinois*, 557 F.2d 596, 604 (7th Cir.), *cert. denied*, 434 U.S. 966, 98 S. Ct. 508, 54 L.Ed.2d 453 (1977); *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976); *Davis v. Passman*, 544 F.2d 865, 873 (5th Cir. 1977); *Cox v. Stanton*, 529 F.2d 47, 50-51 (4th Cir. 1975). *See also Gray v. Union County Intermediate Education District, supra*, 520 F.2d at 805. *Cf. Gagliardi v. Flint*, 564 F.2d 112, 114-16 (3rd Cir. 1977), *petition for cert. pending*; *Kostka v. Hogg*, 560 F.2d 37, 41 n.5 (1st Cir. 1977).

586 F.2d at 624.

All of the cases cited above were decided under the then prevailing rule that municipalities were not "persons" within the meaning of § 1983 and hence, were immune from liability under that statute.[5] *See Monroe v. Pape*, 365 U.S. 167, 187

[5]The inclusion of *Kostka v. Hogg* in the string citation quoted above is misplaced. In *Kostka*, the First Circuit acknowledged that § 1331 provides a *jurisdictional* basis for a constitutional claim against a

(1961). Relying on the Supreme Court's decision in *Bivens*, these circuit courts implied a direct cause of action under the Constitution in order to provide a remedy for plaintiffs whose rights had been violated by municipal governments. In *Monell*, the Supreme Court partially reversed its previous holding in *Monroe*, and held that municipalities could be held liable under § 1983 for constitutional violations which resulted from an "official municipal policy." 436 U.S. at 690, 694 (*Monell* reaffirmed the portion of *Monroe* holding that municipalities could not be held liable for the actions of individual officials under a theory of *respondeat superior*. *Id.* at 691). In light of *Monell*, several circuits reversed their previous positions and held that plaintiffs could no longer bring a direct cause of action against a municipality under the Constitution and 28 U.S.C. § 1331; but rather § 1983 provided the exclusive remedy. *See Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979); *Owen v. City of Independence*, 589 F.2d 335 (8th Cir. 1978), *rev'd on other grounds*, 445 U.S. 622 (1980), *reh'g denied*, 446 U.S. 993 (1980); *Cale v. Covington*, 586 F.2d 311 (4th Cir. 1978); *Molina v. Richardson*, 578 F.2d 846 (9th Cir. 1978), *cert. denied*, 439 U.S. 1048 (1978).

In *Turpin*, the Court of Appeals for the Second Circuit, sitting *en banc*, stated:

> *Monell* held that § 1983 suits may be brought against municipalities under conditions essentially coextensive with those we imposed on the private right of action in *Turpin*. We therefore conclude that —under the very rationale of our prior opinion— there is no place for a cause of action against a

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municipality. 586 F.2d at 41 n.5. The court, however, expressly declined to recognize an implied cause of action under the fourteenth amendment, notwithstanding the lack of an alternative available remedy under § 1983. *Id.* at 44. Accordingly, the court affirmed the dismissal of the plaintiff's complaint against the municipality.

> municipality directly under the 14th Amendment, because the plaintiff may proceed against the City of West Haven under § 1983.

591 F.2d at 427. In *Owen*, the Court of Appeals for the Eighth Circuit stated:

> A post-*Monell* interpretation of § 1983 permits Owen to sue the City of Independence directly, and therefore, we find it unnecessary to rely on the *Bivens* doctrine as we did in our previous opinion. By enacting § 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities. Consequently, no reason exists to imply a direct cause of action under the Fourteenth Amendment.

589 F.2d at 337. In *Cale*, the Fourth Circuit stated: "[W]e are of [the] opinion there is no implied cause of action against the municipality under the Fourteenth Amendment, with jurisdiction under § 1331, for the acts of one of its employees." 586 F.2d at 317. The Fourth Circuit remanded the case with the instruction that Cale be allowed to proceed with his action under § 1983 only. 586 F.2d at 318.

In *Molina*, the Ninth Circuit refused to recognize an implied constitutional cause of action against a municipality even though § 1983 was *not* available as a remedy. In *Molina*, the plaintiff sought damages from the City of Los Angeles based on the alleged misconduct of one of its police officers. The court acknowledged that the city could be sued under § 1983, but also noted that it could not be held liable solely on the basis of *respondeat superior*. 578 F.2d at 847 (citing *Monell*). Finding that the plaintiff's claim against the city was based solely on a theory of *respondeat superior*, the Ninth Circuit upheld the dismissal of the plaintiff's claim. 578 F.2d at 848, 853. *See also Kostka v. Hogg, supra*, note 5.

The Second, Fourth, and Eighth Circuits have all held that municipalities are not subject to a direct cause of action

under the Constitution and § 1331 where § 1983 is available as a remedy for constitutional violations. The First and Ninth Circuits have refused to recognize a direct action under the fourteenth amendment against a municipality notwithstanding the lack of an alternative remedy under § 1983.

In the instant case, plaintiff cites to three Sixth Circuit cases wherein we continued to allow direct constitutional claims against municipalities under § 1331 even after the Supreme Court's decision in *Monell*. *See Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983) (Amen II), *cert. denied*, 465 U.S. 1101 (1984); *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979); *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978).

A careful reading of these cases, however, reveals that this court never expressly considered whether it was still necessary to imply a direct constitutional claim under § 1331 in light of *Monell* which allowed plaintiff's to bring constitutional claims against municipalities under § 1983. Thus, as we noted in *Harris*, "This court has not specifically addressed the issue since *Monell*, with actions generally proceeding under both § 1983 and § 1331." 725 F.2d at 374, n.3.[6]

In *Jones*, our discussion of *Monell* was essentially limited to the portion of that opinion reaffirming the principle that a municipality could not be held liable solely on the basis of *respondeat superior* for constitutional violations committed by municipal employees. 586 F.2d at 624 (citing *Monell*, 436 U.S. at 691). The limited scope of our analysis in *Jones* was emphasized by the following statement: "The *only* issue on this appeal is whether the doctrine of *respondeat superior*

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[6]Two years prior to our decision in *Harris*, Judge Merritt wrote: "[I]t is unclear after *Monell* whether the Supreme Court will approve this circuit's implication of a *Bivens*-type direct action under the Fourteenth Amendment . . . ." *Hayes v. Jefferson County*, 668 F.2d 869, 876 (6th Cir. 1982) (Merritt, J., dissenting).

should be applied to actions against municipalities brought directly under the fourteenth amendment and § 1331." 586 F.2d at 624 (emphasis added). Analogizing to the Supreme Court's decision in *Monell*, the *Jones* court found that "[i]t would be incongruous to hold that the doctrine of *respondeat superior* can be invoked against a municipal corporation in an action under § 28 U.S.C. § 1331, when the doctrine has no application in an action under 42 U.S.C. § 1983." 586 F.2d at 625. Nowhere in the *Jones* opinion is there any discussion of whether § 1983 should or should not provide the exclusive remedy where it is available. Rather, the *Jones* court simply assumed that the plaintiff had stated a proper cause of action under the fourteenth amendment and § 1331, citing to a long line of pre-*Monell* cases.

In *Lenoir*, we allowed the plaintiff to bring direct constitutional claims pursuant to § 1331 against several local governmental units for flood damage caused by a waterway improvement project. 586 F.2d at 1093-96. Although *Lenoir* was decided shortly after the *Monell* decision was released, the *Lenoir* opinion does not make any references to that case. Therefore, it is obvious that the *Lenoir* court did not consider the potential impact of *Monell* on the availability of direct constitutional claims against municipalities.

The most recent of the post-*Monell* cases cited by plaintiff is *Amen v. City of Dearborn*, 718 F.2d 789 (1983) (*Amen* II). In *Amen II*, we reaffirmed our previous ruling in the same case by allowing the plaintiffs to bring a direct constitutional claim against the City of Dearborn based on the fourteenth amendment and § 1331. *See Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976) (*Amen I*). At the time *Amen I* was decided, municipalities were not subject to liability under § 1983. In *Amen II* we noted that *Monell* had been decided during the interim between *Amen I* and *Amen II*. However, having previously held that the plaintiffs had stated a claim under § 1331, we found it unnecessary to consider whether they could also bring a claim under § 1983. "The merits of

the cross-appeal are largely irrelevant in light of our holding that jurisdiction over the City exists under § 1331. Accordingly, we need not consider whether § 1343(3) would be an additional and proper jurisdictional bases [sic] for this action." *Amen II*, 718 F.2d at 794 (citations omitted). The *Amen II* court apparently did not consider the alternative analysis, i.e., the availability of § 1983 made it unnecessary to imply a direct cause of action under § 1331.

We find it significant that each of these cases—*Jones*, *Lenoir*, and *Amen II*—originated in district court cases decided prior to *Monell* when a direct constitutional claim pursuant to § 1331 was the only available cause of action against a local governmental unit. Since the Supreme Court's ruling in *Monell* did not affect the *result* of any of these cases, we simply followed the analytical approach established by the preceding district courts without considering whether it might be more appropriate to require plaintiffs to bring their constitutional claims under § 1983 now that it is available.

We conclude that the precedents cited above do not preclude us from holding that § 1983 provides the exclusive remedy for the constitutional claims brought by the plaintiff in this case against the city official. Plaintiff seeks to establish a separate independent constitutional claim under § 1331 based on the same facts and the same substantive constitutional provisions which gave rise to her claim under § 1983. The only justification which plaintiff provides for the recognition of a separate theory is that it would arguably allow her to take advantage of the six year Ohio statute of limitations which applies to actions arising under statutes. We find this argument to be disingenuous at best. First, even if we were to imply a direct cause of action, it would be a judicially created remedy, and hence, not based on the statute. Therefore, the Ohio statute of limitations dealing with actions arising under statutes would not be the most analogous. Plaintiff argues that her direct constitutional claims are based on 28 U.S.C. § 1331.[7] This statute, however, merely provides the

[7]We note also that plaintiff's complaint did not specifically reference § 1331 as a jurisdictional basis.

basis for jurisdiction, it does not create a cause of action in and of itself. *See Molina*, 576 F.2d at 848-49. Second, the recognition of a second direct constitutional claim with a different statute of limitations would run contrary to the intent of the Supreme Court's mandate in *Wilson* instructing the federal courts to adopt *one* statute of limitations in each state for all § 1983 claims. 471 U.S. at 275.

Accordingly, the district court's dismissal of plaintiff's suit is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| LAUREL C. THOMAS | CASE NO. C85-1036 |
| Plaintiff | JUDGE SAM H. BELL |
| -v- | |
| | *ORDER* |
| WALTER SHIPKA | [Filed July 16, 1985] |
| Defendant | |

Plaintiff Laurel C. Thomas filed this action pursuant to Title 42 of the United States Code, section 1983, to redress alleged civil rights violations. In her two count complaint, she claims that her first amendment freedom of association and due process rights were violated by defendant Walter Shipka when her employment as a deputy clerk for the Parma Municipal Court was terminated for political reasons.

Presently before the court is defendant's motion to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The plaintiff has responded in opposition to this motion.

When reviewing a motion to dismiss, the court is confined to examination of the sufficiency of a pleading. In this case, plaintiff's complaint is being so tested. In order to review this motion, all of the material allegations of fact contained in the plaintiff's complaint are to be taken by the court as true, and the court must construe the complaint in her favor. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Gardner v. Torlet Goods Ass'n*, 387 U.S. 167, 172 (1967). To dismiss the complaint, the court would have to find it beyond doubt

that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

It is thus necessary to briefly summarize the material facts presented by plaintiff's complaint. Defendant served as Clerk of Courts, an elective office, for the Parma Municipal Court at all times relevant to this case. He is a registered Democrat. Plaintiff was hired as a deputy clerk by defendant on September, 1976. Plaintiff asserts that her position is a nonpolicy making position. She had an excellent work record for six and one-half years until she was discharged by defendant on April 7, 1983.

During her tenure as deputy clerk, plaintiff developed a close working relationship with one of the Republican judges on the Parma Municipal Court. Plaintiff alleges that defendant fired her so that he could hire a person with strong ties to the Democratic party, thereby strengthening his own position and satisfying political obligations. In order to create a vacancy and accomplish her discharge, she contends that he contrived a work assignment situation which would lead to charges of insubordination and lying. He disseminated information after her discharge that these were the reasons. She was not provided with the hearing she requested and was due her under Parma Ordinance 173.11 relating to non-civil service employees.

Defendant asserts in his motion that plaintiff's claims under both the first amendment and the fourteenth amendment must be dismissed for failure to state a claim. In relation to the first amendment count, defendant first alleges that there is no claim because plaintiff's position is confidential in nature which was subject to political dismissal. Constitutional protection for political activities extends only to non-confidential, nonpolicy making employees. *Elrod v. Burns*, 427 U.S. 347 (1976). However, plaintiff specifically alleges in her complaint that her position was nonconfidential and nonpolicy making. Complaint at paragraph 9. Bearing in mind that the allegations of the complaint must be taken as

true, her first amendment claim cannot be dismissed on this basis.

Defendant also asserts that plaintiff has failed to state a claim because she herself has plead a valid reason for her dismissal. This is a misinterpretation of the complaint, however. Plaintiff claims that the reason advanced for her discharge was a sham and the true reason was political. This claim is sufficient to survive a motion to dismiss.

Defendant claims that plaintiff's due process claim should be dismissed on the basis of the Court's position in *Parratt v. Taylor*, 451 U.S. 527 (1981). The essence of his argument is that the plaintiff had a state post deprivation remedy sufficient to satisfy due process requirements. This argument fails at this stage of the proceedings for the reason that there is no way for the court to examine the state remedies available to be comfortable with a finding that they satisfy due process requirements. *Loudermill v. Cleveland Board of Education*, 53 U.S.L.W. 4306, 4308 (1985); *Barnier v. Szentmiklosi*, 565 F.Supp. 869, 881 (E.D. Mich. 1983). In addition, the court is not convinced that *Parratt* has any application to plaintiff's claims which involve infringement of both property and liberty interests due to the denial of a hearing after publication of false information which was reputationally damaging in the context of future employment. *See* Complaint at paragraphs 16, 17. *See also Burkhart v. Randles*, No. 84-5054, slip. op. at 6-11 (6th Cir. June 18, 1985). (The court discusses due process in the context of a political firing.)

Defendant also urges the court to dismiss plaintiff's due process claim that she was stigmatized based on statute of limitations grounds. The Supreme Court has recently decided that the state statute of limitations applicable to personal injury claims be used for all §1983 causes. *Wilson v. Garcia*, 53 U.S.L.W. 4481 (1985). That Ohio statute provides that plaintiffs must file within two years of the date of occurrence. O.R.C. §2305.10 (Page Supp. 1984). Plaintiff was discharged on April 6, 1983. Her case was filed on

April 5, 1985, within two years.

Accordingly, having construed plaintiff's complaint in the manner required at this stage of the proceedings, defendant's motion to dismiss must be denied.

IT IS SO ORDERED.

/ s /

SAM H. BELL
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| LAUREL C. THOMAS | CASE NO. C85-1036 |
| Plaintiff | JUDGE SAM H. BELL |
| -v- | *ORDER* |
| WALTER SHIPKA | [Filed January 31,1986] |
| Defendant | |

Pending before the court in this matter is plaintiff's motion for enlargement of time or a stay to respond to defendant's motion for summary judgment. The basis of this request is the necessity for this court to review its prior ruling on the statute of limitations question raised by defendant's motion to dismiss in light of the opinion recently issued by the Sixth Circuit Court of Appeals, *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985).

By order filed on July 16, 1985, this court ruled that plaintiff's action was timely in that it was filed within two years as required by Ohio's personal injury statute. Ohio Revised Code §2305.10 (Page Supp. 1984). This finding was rendered in light of the United States Supreme Court's recent decision that the state statute of limitations applicable to personal injury claims should be applied to all §1983 action. *Wilson v. Garcia*, 471 U.S. ___, 85 L.Ed.2d 254 (1985).

On November 26, 1985, subsequent to this court's resolution of the statute of limitations issue, the Sixth Circuit Court of Appeals issued the decision of *Mulligan v. Hazard*, 777 F.2d at 340, and found that the appropriate statute to be applied in Ohio consistent with *Wilson* is the one-year limitations period contained in Ohio Revised Code §2305.11

applicable to assault and battery. (The legislature has recently amended §2505.11 by removing assault and battery from its provisions. The statute now to be used for assault and battery is §2305.111 which limits actions to a one-year period.)

Pursuant to *Mulligan v. Hazard*, plaintiff's cause of action under §1983 was filed beyond the one-year period and must thus be dismissed. In her two count complaint, she alleged violations of §1983 by virtue of deprivations of her first and fourteenth amendment rights. She now asserts that her direct constitutional claims need not be dismissed and may proceed independent of her §1983 claims.

It is clear that federal question jurisdiction, 28 U.S.C. §1331, encompasses claims arising under the amendments to the Constitution. *Lake Lansing Special Assessment Protest Ass'n v. Ingham County Board of Commissioners*, 488 F.Supp. 767, 770 (W.D. Mich. 1980) (citing *Kenosha v. Bruno*, 412 U.S. 507 (1973); *Amen v. City of Dearborn*, 532 F.2d 554 (6th Cir. 1976); Wright and Miller, Federal Practice and Procedure, §3372). In fact, some courts in this circuit have allowed concomitant implied constitutional claims in §1983 actions even while noting their redundancy. *Banks v. City of Forest Park*, 599 F.Supp. 465, 473 (S.D. Ohio 1984); *Smith v. Jordan*, 527 F.Supp. 267, 172-73 (S.D. Ohio 1981).

Assuming that plaintiff may proceed on her constitutional claims, this court must determine what statute of limitations applies to her cause of action. *Harris v. City of Canton*, 725 F.2d 371, 374 n.3 (6th Cir. 1984). Like §1983, the first and fourteenth amendment do not contain a limitations period for actions based upon them to be brought. Also, like §1983, the most closely analogous state statute of limitations applies. *Blanck v. McKeen*, 707 F.2d 817, 819 (4th Cir. 1983) (citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975)).

Through the process of defining the most appropriate limitations period for §1983, the courts have focused on the nature of the underlying constitutional violation. *Wilson v.*

*Garcia*, 471 U.S. ___, 85 L.Ed.2d 254 (1985); *Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985). In this court's view, the analysis for determining the most analogous state statute of limitations should be the same for both §1983 actions and implied constitutional claims. *See Harris v. City of Canton*, 725 F.2d at 374 n.3. Even if the one-year statute of limitations for assault and battery, Ohio Revised Code §2305.111, is arguably not the most analogous to plaintiff's claims under the first and fourteenth amendment, the one-year statute provided for libel and slander provided by Ohio Revised Code §2305.11 would be applicable and would yield the same result.

Accordingly, this court finds that plaintiff's case was filed beyond one year and must be dismissed in its entirety.

IT IS SO ORDERED.

/ s /

SAM H. BELL
U. S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1384

IN THE

# Supreme Court of the United States

October Term, 1987

LAUREL C. THOMAS,
*Petitioner,*

vs.

WALTER SHIPKA,
In his capacity as Clerk of the
Parma Municipal Court,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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I.

## QUESTION PRESENTED FOR REVIEW

Whether a federal court of appeals, in applying *Wilson v. Garcia*, 471 U.S. 261 (1985), to select a single state statute of limitations to apply in actions brought under 42 U.S.C. Section 1983, may choose the state's limitations period for intentional personal injuries.

## II.

## CORPORATE AFFILIATION

Respondent appears in his official capacity as Clerk of the Parma Municipal Court, an office established under Ohio statutes. However, any judgment assessed against that office as part of the Court's official expenses would be pro rated among the various municipalities served by the Court. The City of Parma, Ohio, would bear the largest share of such allocated expenses. Parma is a municipal corporation.

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# No. 87-1384

IN THE

# Supreme Court of the United States

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LAUREL C. THOMAS,
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vs.

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In his capacity as Clerk of the
Parma Municipal Court,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Walter Shipka, in his official capacity as Clerk of the Parma Municipal Court, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's opinions in this case. The opinions are reported at 829 F.2d 570 (1987) and 818 F.2d 496 (1987).

## STATEMENT OF THE CASE

Petitioner, Laurel Thomas, was a deputy Clerk in the Parma Municipal Court (Complaint, paragraph 3). On April 7, 1983, she was discharged by respondent Walter Shipka, Clerk of the Court (Complaint, paragraph 15). This action was filed on April 5, 1985, alleging violations under 42 U.S.C. Section 1983 and the Constitution in her being dismissed and the stigma resulting from it (Complaint, paragraphs 19-21).

Shipka filed a Motion to Dismiss on April 29, 1985, asserting *inter alia* a statute of limitations defense, specifically relying on Ohio's one-year intentional tort statute, and citing *Migra v. Warren City School District*, Case No. C80-1183-Y (N.D. Ohio 2/17/81), Slip Op. at 8, *aff'd*, 703 F.2d 564 (6th Cir. 1982), *vacated and remanded on other gds.* 465 U.S. 75 (1984) (Shipka's Motion to Dismiss, at 9). The District Court, in its Order of July 16, 1985, denied the Motion, holding, at 4, that the recent decision by this Court in *Wilson v. Garcia*, 471 U.S. 261 (4/17/85), called for use of Ohio's two-year statute for general negligence claims (Petitioner's Brief, 31a).

On January 17, 1986, Shipka filed a Motion for Summary Judgment, asserting a variety of grounds. On January 28, by way of a Motion for Enlargement of Time to Respond, Mrs. Thomas brought to the District Court's attention both the Sixth Circuit's decision in *Mulligan v. Hazard*, 777 F.2d 340 (11/25/85), *cert. denied*, 106 S. Ct. 2902 (1986), and the decision in *Petrovich v. City of Eastlake*, Case No. C84-1355 (N.D. Ohio, 12/17/85) which, in reliance on *Mulligan*, had dismissed a pending Section 1983 action due to the one-year statute.

In its ruling of January 31, 1986, the District Court reconsidered its prior decision as to the statute of limitations. It held, at 2, that the one-year Ohio assault and battery statute adopted in *Mulligan* compelled dismissal of the Section 1983 cause of action, and at 3, that the same one-year statute barred any direct Constitutional claims (Pet. Br., 34a-35a).

On May 1, 1987, the Sixth Circuit Court of Appeals affirmed that dismissal, confirming that Circuit's commitment to use of the Ohio statute of limitations for assault and battery (Pet. Br., 15a, n.2, 16a-17a). On rehearing, in an opinion dated September 25, 1987, the Court of Appeals reaffirmed the district Court's dismissal and expressly reiterated the continuing effect of its adoption of the assault and battery limitations period for Ohio (Pet. Br., 3a, n.3).

## REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has chosen not to contest the Sixth Circuit's decision not to recognize a claim for relief à la *Bivens v. Six Unknown Named Agents*, 403 U.S. 338 (1971) (Pet. Br., 7, n.4). Petitioner has chosen not to contest the Sixth Circuit's decision to give *Wilson v. Garcia*, 471 U.S. 261 (1985), retroactive effect under the facts of this case (Pet. Br., 7, n.5). All that remains for Petitioner to argue then is to question the Sixth Circuit's adoption of the Ohio statute of limitations for assault and battery with respect to Section 1983 claims.

Petitioner points out (Pet. Br., 6), and we agree, that the Sixth Circuit's decision in the case at bar is based, not on any new analysis of the law, but upon its own holding in *Mulligan*, *supra*, decided in the fall of 1985. For all practical purposes then, Petitioner asks the Court to review the decision in *Mulligan*. That request was made before; and this Court has already declined the invitation. *Mulligan v. Hazard*, _____ U.S. _____, 106 S. Ct. 2902.

The Sixth Circuit is not alone in adopting a state statute of limitations applicable to intentional torts. As Petitioner admits, both the Eleventh and Fifth Circuits have followed that course. *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), *cert. denied*, 474 U.S. 1105 (1986); *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). The significant fact, however, is that this Court has undeniably been aware of the divergence of views on this issue in other circuits; yet, repeatedly, this Court has chosen to allow the Circuits to go their separate ways. *See, e.g., County of Wayne v. Carroll*, _____ U.S. _____, 107 S. Ct. 330 (1986); *Jones, supra*, 474 U.S. 1105. Indeed, this Court

has expressly held that national uniformity as to a statute of limitations is not a constitutional requirement. *Board of Regents v. Tomanio,* 446 U.S. 478, 489 (1980).

There has been no change in either the statute itself or the decisions of this Court interpreting 42 U.S.C. Section 1983 which would warrant the Court's exercising its discretionary right of review now.

The only authoritative precedent on this point remains the opinion in *Wilson v. Garcia.* In arriving at the principle that there would be a single statute of limitations in each state, one sounding in tort, that would control Section 1983 actions, this Court made plain its understanding that the historical catalyst for Section 1983 lay in Congress's concern over a "campaign of violence and deception in the South," as expressed through murders, whippings, and lynchings. *Wilson,* 105 S. Ct., 1947. As characterized by this Court, the specific Congressional concern of that day was less with a prison warden losing a prisoner's mail-order hobby kit, *see Parratt v. Taylor,* 451 U.S. 527 (1981), than it was with ending "atrocities." 105 S. Ct., 1948.

In *Wilson,* this Court instructed the Bench and Bar "to select, in each State, the *one* most appropriate statute of limitations for all Section 1983 claims." 105 S. Ct., 1947 (emphasis added). Yes, this Court has indeed acknowledged that a Section 1983 action may arise from negligent conduct; and, yes, a claim may arise from the violation of a federal statute, as Petitioner argues (Pet. Br., 22). But, if the test is what the 42d Congress would have done, 105 S. Ct., 1948, can it really be questioned but that the Congressional intent would undoubtedly have been to select the intentional tort analogy to reflect its overall concerns? Just as this Court relied upon its perception of original Congressional intent to hold that

*respondeat superior* does not apply to Section 1983 claims but only to actions taken pursuant to official policy or custom, *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), so, we submit, that the same original Congressional intent would dictate that we employ a limitations period based on official and intentional conduct.

This Court has already spoken on the single issue Petitioner presents, both through the Circuit decisions the Court has knowingly allowed to stand, and through its very clear instructions in *Wilson*. *Mulligan*, and, in turn, the Sixth Circuit's decision herein already accurately reflect those teachings. No purpose would be served by this Court's again going down that road.

## CONCLUSION

For these reasons, a writ of certiorari should not be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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